

IN THE HIGH COURT OF JUDICATURE AT PATNA

Govt. Appeal (DB) No.50 of 1990

State of Bihar

.... Appellant/s

Versus

Bhupendra Yadav son of Raghunandan Pd. Yadav R/O Village-Bhirkhi, P.S. Madhepura, Distt-Madhepura.

.... Respondent/s

with

Criminal Appeal (DB) No. 192 of 1990

Bhupendra Yadav son of Raghunandan Pd. Yadav R/O Mohalla-Bhirkhi, Ward No.10, P.S. Madhepura, Distt-Madhepura.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

Appearance :

(In G. APP. (DB) No. 50 of 1990)

For the Appellant/s : Mrs. Shashibala Verma, APP

For the Respondent/s : Mr. Ranjan Kumar Jha, Adv.

(In CR. APP (DB) No. 192 of 1990)

For the Appellant/s : Mr. Mr. Ranjan Kumar Jha, Adv.

For the Respondent/s : Mrs. Shashibala Verma, APP

CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 27-07-2012

State Appeal No. 50 of 1990 as well as Cr. Appeal No. 192/1990 commonly originate over judgment dated 16th May 1990 passed by the Additional Sessions Judge, Madhepura in Sessions Case No. 13/1985. The State is aggrieved by a finding recorded by the learned lower court whereby and whereunder the learned lower court had not found offence under Section 307 of the IPC proved against the appellant-convict and instead


thereof held the sole appellant-convict guilty for lesser offence punishable under Sections 324, 323 of the IPC.

2. On the other hand, sole appellant has challenged the finding of the learned lower court whereby and whereunder he has been found guilty for offence punishable under Section 324 of the IPC and further has been directed to undergo R.I. for one year as well as under Section 323 IPC whereunder he has been directed to undergo R.I. for six months and further directing the sentences to run concurrently.

3. The factual scenario giving rise to present appeal is as follows:

Panchu Prasad Yadav (PW-4) filed a written report on 24.01.1983 disclosing therein that on 24.01.1983 (over-writing) he had kept the harvested Rahar crop at his house. In the morning at 8:15 A.M. the sole appellant Bhupendra Prasad Yadav son of Raghuni Prasad Yadav came at his Darwaza and began to abuse him and further threatened to kill if he did not hand over the Rahar crop. Over this, he told him to convene Panchayat but this offer was not accepted by the appellant. Then, thereafter the appellant had chased him as well as his son with Gadasa and during said course, he gave a Gadasa blow over head of his son, Shankar Kumar causing injury thereupon. His son became unconscious and the informant also sustained injury. Om Prakash Yadav (not examined), Dharendra Pd. Yadav (PW-3) along with others were cited as witnesses.


4. On the basis of the aforesaid written report, Madhepura P.S.



Case No. 13/83 was registered initially under Section 324 of the IPC but during course of investigation, 307 of the IPC was also added whereunder charge-sheet was also submitted and accordingly, after taking cognizance the case was committed to the court of sessions where trial had commenced and concluded in a manner by the impugned judgment which happens to be subject matter of the instant appeal.


5. The defence case as is evident from mode of cross-examination as well as from the statement recorded under Section 313 of the Cr.P.C. is that accused is innocent and has been falsely implicated in this false and concocted case. Then, it has been submitted that on the alleged date and time of occurrence the prosecution party made house trespass and brutally assaulted the accused on account of which Madhepura P.S. Case No. 12/83 was registered and the prosecution party only to save their skin had filed the instant case as a counter blast. To support the same three DWs have been examined as well as relevant documents have also been exhibited.

6. Learned Addl. P.P while assailing the impugned judgment has submitted that from the ocular evidence adduced on behalf of prosecution there happens to be consistent version of the PWs regarding assault made on the person of Shankar Kumar over vital part of body that means to say over head and on account thereof, the victim had sustained grievous injury caused by sharp cutting weapon. Not only this, nature of injury as found by



PW-7, the Doctor, was grievous. Such injury was so severely inflicted that it had cut away parietal bone and that being the admitted position, it could safely be inferred that the appellant-convict had inflicted Gadasa blow with an intention or knowledge to commit murder of Shankar Kumar. Therefore, the finding that prosecution had not been able to prove its case for the charge framed under Section 307 of the IPC and further identifying the same for lesser offence punishable under Sections 324, 323 of the IPC appear to be contrary to the evidence available on record. Learned counsel for the State submits that the same is fit to be set aside and the appellant-convict should be held guilty and sentenced for an offence punishable under Section 307 of the IPC for committing murderous attack over the person of Shankar.

7. It has further been submitted that coming to the conclusion as recorded by the learned lower court, the learned lower court chose a wrong method for appreciation of evidence more particularly when there happens to be consistent evidence that appellant-convict had inflicted Gadasa blow over the head of Shankar which had caused sharp cutting grievous injury. In such circumstance learned counsel for the State had submitted that there could be no option for the learned lower court save and except to conclude and hold that appellant-convict was responsible for committing murderous attack over the person of Shankar hence liable for conviction and sentence under Section 307 IPC. It has further been submitted that by holding the



appellant-convict guilty for an offence punishable under Section 324 of the IPC it would give a clear-cut impression with regard to acceptance of injury caused by him by sharp cutting weapon but the injury report itself suggests presence of a single sharp cut injury, grievous in nature, over the head of Shankar and therefore application of Section 324 of the IPC on its face is wholly unjustified. Therefore, it is submitted that the finding recorded by learned lower court should be set aside and appellant-convict be held liable for an offence punishable under Section 307 of the IPC.

8. On the other hand, learned counsel for the appellant-convict while assailing the judgment of conviction and sentence as well as refuting argument raised on behalf of State has submitted that the finding of learned lower court is suffering from conjectures and surmises. The learned counsel has further submitted that there happens to be inconsistencies amongst the PWs with regard to manner of occurrence as well as place of occurrence which supports the defence version whereunder there happens to be an allegation against the prosecution party for committing house trespass and brutally assaulting the appellant-convict as well as his other family members and for which a case has also been filed on behalf of defence prior to the present case. Further, it has been submitted that when there is case and counter case, that means version and counter version and the same has been legally brought up on record along with injury report and further there is admission on the part of prosecution witnesses with regard to registration

of the case at the hands of appellant-convict before institution of present case, then in that event, non explanation of injury sustained by appellant-convict gives a clear cut impression that the prosecution has not come with the clean hand as well as by such step it had tried to suppress the real and true genesis as well as manner of occurrence.

9. With regard to the evidence on record, it has been submitted that there happens to be inconsistencies amongst the witnesses on each and every count which severely affect the version of the prosecution putting doubt over manner of occurrence as suggested. It has further been submitted that it is a settled principle of law that when there happens to be doubt with regard to manner or genesis of occurrence then in that event, the prosecution case is fit to be disbelieved. As such, it has been pleaded that appellant-convict is entitled for acquittal.

10. In order to appreciate the evidence and the material available on the record in its right perspective, a glance thereof has to be made.

In order to substantiate its case the prosecution had examined altogether 8 PWs (numbering is wrong) out of whom PW-1 is Hirday Nand Thakur, PW-2, Parshuram Yadav, PW-3, Dharendra Kumar Yadav, PW-3A, Chandra Kishore, PW-4, Panchu Pd. Yadav, PW-5, Shankar Kumar, PW-6, Vijay Kumar, PW-7, Dr. A.Z. Mallik as well as has also exhibited Ext-1, FIR, Ext-2, X-ray plate, Ext-3, Injury report of Shankar, Ext-3/A, Injury report of Panchu Pd. Yadav, Ext-4, C.C. of order dated 10.03.89 as well as

13.03.89 passed in Cr. Appeal No. 1/89, Ext-5, Written report. Side by side defence had also examined three DWs out of whom DW-1 is Chandra Kishore Pathak (Formal), DW-2, is Devendra Yadav. (Formal), DW-3, Nawin Pd. Yadav (Formal) and had exhibited Ext-A, Injury report of appellant-convict, Bhupendra Yadav, Ext-B, C.C of judgment of G.R. No.63/83, Ext-B/1, C.C. of judgment of G.R. 406/81, Ext-C, C.C of order of Misc. Case No. 520/81, Ext-D, Formal FIR of Madhepura P.S. Case No. 12/83, Ext-E, Written report of Madhepura P.S. Case No. 12/83, Ext-F, Sanha No.977/82, Ext-G, signature of Om Prakash Yadav (FIR named witness) on affidavit, Ext-H, bail bond.

11. First of all the evidence of Doctor is to be taken into consideration. The Doctor PW-7 had examined Shankar Kumar Yadav on 24.01.83 at 9:45 A.M. and found the following injuries:-

(1) One incised wound 3"x1/3"x bone deep on the left side of the head with cutting of the left parietal bone which was confirmed by X-ray plate.

The aforesaid injury on account thereof was opined to be grievous in nature caused by sharp cutting weapon and the age of injury has been shown to be within six hours at the time of examination.

12. On the same date at about 9:50 A.M. the doctor had examined Panchu Pd. Yadav and found following injuries.


(1) Defused swelling 1"x1" on the front of the middle of the head.

(2) Two abrasion 2 ½"x ¼" on the front of the left knee as well as on the upper part of the left leg.

Simple in nature. Caused by hard and blunt substance and the age of injuries has been estimated within six hours from the time of examination.

13. During cross-examination he had admitted absence of mark of identification though he had disclosed that the injury was itself sufficient to identify the injured. Then, he had further said that he had not mentioned the fact whether Shankar Kumar Yadav was conscious or not. He had also exhibited injury report of appellant-convict as Ext-A. So from his evidence it is evident that Shankar Kumar Yadav had sustained single sharp cutting grievous injury while his father, the informant had sustained three simple injuries. Side by side he had also shown presence of injury over the person of appellant-convict.

14. PW-5 happens to be Shankar Kumar Yadav, one of the injured. He had deposed that on 24.01.83 at about 8:00 A.M. while he was inside his house, Bhupendra came at his Darwaza and began to abuse his father as well as also had threatened to assault him. PW-5 had said that he came out and requested the appellant to convene a Panchayat but the appellant did not pay any heed to such request and had inflicted Gadasa blow over his head causing injury at its left side as a result whereof blood had started oozing out of his injury. He had also said that on intervention of




his father, Bhupendra assaulted him as well with the back of the Gadasa as a result whereof he became unconscious and had regained sense at Madhepura Hospital. He had also said that he remained admitted at Hospital for 16 days. During cross-examination, he had clearly stated in paragraph-3 that he was not repeatedly assaulted only on account of intervention of his father. Then at para-4, he had said that only one blow was given over him on his head and he was in sense till assault over his father but he did not count as to how many blows were given over his father. His father according to PW-5 was assaulted from back of Gadasa below knee. At para-5 he had said that when Parshuram, Chandra Kishore, Dhirendra came to their rescue, Bhupendra had fled away. The aforesaid persons were present since before. In para-7 of his cross-examination, he had said that at the time of occurrence Bhupendra had wrapped his body wherein he had concealed Gadasa. Then, he had said that accused had covered distance of about 15 feet and had given blow over him from the distance of one hand. In para-11, he had admitted that they are on inimical terms with the appellant. In para-12, he admitted presence of counter case. He had however denied the suggestion that his statement was not at all recorded by the police. He had also denied the suggestion that they happened to be aggressor and had assaulted the accused and to save their skin this false case had been subsequently registered.

15. So from the evidence of this PW-5, it is evident that he


happens to be firm and consistent over the genesis as well as manner of occurrence. At the present juncture, it is pertinent to note that from the evidence of PW-6, the I.O. at para-7, it is evident that this PW-5 was not at all examined by him during course of investigation under Section 161 of the Cr.P.C. So, what repercussion the aforesaid event has, will be taken up in the later part of judgment.

16. PW-4 happens to be informant himself. He, in his examination-in-chief, had said that on 24.01.83 at about 8:15 A.M. while he was at his Darwaza, accused appellant Bhupendra came and began to abuse and was raising plea that since PW-4 had forcibly harvested and lifted Rahar and so it should be handed over to him (appellant). The aforesaid demand was denied by PW-4 who had further requested appellant to convene Panchayat but the appellant did not accept the same and had inflicted Gadasa blow over head of Shankar(PW-5) causing injury thereupon. PW-4 had said that he had rushed to rescue his son PW-5 and in the process he was also assaulted with back of Gadasa over his leg and knee. He had also named, Dhirendra, Om Prakash, Parshu Ram and Chandra Kishore and others who had rescued them and also to have witnessed the occurrence. Thereafter, PW-4 had rushed to Madhepura P.S. and then was sent to hospital where his son PW-5 was admitted in Hospital for 20 to 22 days. In para-2 and 3 of his examination in chief, he had put some sort of allegation against the police with regard to over-writing



persisting over written report. During cross-examination he had admitted that the appellant accused happened to be his nephew but had also claimed that their land had finally been partitioned according to their share though a dispute was still persisting amongst them with regard to a piece of homestead land. Then, he had also said that accused had wrongly claimed the land of the prosecution party. In para-8 he had admitted that about a dozen cases were pending in between the parties. At para-10 he had disclosed the topography of his house as well as that of the appellant accused. From para-11 and 12 of evidence of PW-4, it is evident that he had categorically narrated the entire occurrence, as to how it took place and in what manner at the hands of the appellant accused both PW-4 and PW-5 had suffered injuries. In para-14 he had further disclosed that his son (PW-5) was unconscious even at the P.S. when he along with his son had gone after the occurrence. In para-15 he had said that he had shown the blood stained earth to the police but he was not remembering whether the same was seized or not. Then, at para-18, he had admitted that on account of presence of counter case he was arrested at the P.S. itself. He had however denied the suggestion that they were aggressors wherein they had assaulted the appellant accused, who had already instituted a case and only to safeguard their interest the present case had been filed.


17. So from his evidence, it is crystal clear that before his arrival at the P.S. a case at the instance of appellant-convict had already been



registered in which PW-4 was arrested at the P.S. itself. The only improbability visualizing from his evidence is that how the injured Shankar was taken to hospital when he was also accused in the counter case and further, if he was under police surveillance, why his statement was not recorded by police. There happens to be in fact no explanation whatsoever on this score even in the evidence of PW-6, the I.O. However, so far genesis as well as manner of occurrence is concerned, it has been properly proved by the prosecution.


18. PW-1 is formal in nature and had exhibited formal FIR and on account thereof, his evidence does not appear to be relevant on material point.

19. PW-2 had deposed that on the alleged date and time of occurrence while he was going to his house from market and reached near the house of Panchu, he heard uproar and on account thereof, he reached there and found Shankar (PW-5) and Bhupendra indulged in an altercation. Appellant Bhupendra according to him was armed with Gadasa and had given a Gadasa blow over the head of Shankar as a result whereof Shankar had fell down. Panchu, PW-4 is said to have rushed in his rescue over which he was also assaulted by the appellant with the back of the Gadasa. Dharendra, Om Prakash and others according to PW-2 had witnessed the occurrence. Thereafter, injured PW-5 was taken to the hospital and blood had oozed out from his injury. In cross-examination, he had admitted



presence of counter-case launched at the behest of appellant Bhupendra but had denied that he or his father had stood as bailor. In para-9, he had admitted that the house of accused was by the side of road. He had also said that first of all he had seen the occurrence from road and then had gone to the Darwaza. According to him apart from the appellant accused and the prosecution party, 10 to 12 persons had assembled there who were forbidding the appellant accused. At para-12 he had said that during course thereof he had seen Gadasa in the hand of appellant Bhupendra. At para-15, he had stated that single blow was inflicted by the appellant over the head of Shankar, on which Shankar fell down. He also claimed to have rushed to Shankar while Gadasa remained in the hand of the appellant. P.W-4, Panchu had gone near his son PW-5 and after assault accused had fled away. Blood had oozen out from the injury of PW-5 and fell on the earth. Then, he had also admitted that first of all Bhupendra had instituted the case.

20. PW-3 had stated that on the alleged date and time of occurrence while he was going to his house from Chowk, he heard some sound coming from the house of Panchu over which he along with others had gone there and had seen both the sides to have indulged in an altercation with regard to Rahar crop. During said course, appellant Bhupendra had assaulted PW-5 son of Panchu with Gadasa over his head on account of which he had fell down and blood had oozen out of his injury as also his father (PW-4) also had sustained injury at the hands of appellant



Bhupendra. During cross-examination he had said that at the place of occurrence so many persons including villagers and outsiders had already assembled there and people were trying to pacify both the parties. He had explained that Gadasa by which assault was made by the appellant was used for cutting of fodder. The appellant had inflicted Gadasa blow suddenly on PW-5 and only a single blow was inflicted on Shankar who had fell down and blood had oozen out of his injury. According to PW-3 he had not seen assault over Panchu nor had seen any injury over the person of Panchu (PW-4). Then, he had disclosed that there was land dispute in between Panchu and Bhupendra. He said also admitted that in a police case he had deposed against the appellant accused.

21. Witness no.3A has stated that on the alleged date and time of occurrence while he was at his house, he came to the house of Panchu Yadav (PW-4) after hearing alarm. He came to the Darwaza of Panchu and had seen an altercation was going on in between Bhupendra, Panchu and Shankar for distribution of Rahar crop. In the midst thereof, Bhupendra gave a Gadasa blow over the head of Shankar. Panchu was also assaulted by the back of Gadasa. Blood had oozen out from the injury caused over the person of Shankar Yadav. In cross-examination, he had said that such assault took place in his presence and that when he reached at the place of occurrence he had seen both the parties indulging in an altercation at the Darwaza of Panchu. Occurrence according to PW 3A, took place after one

or two minutes of his arrival at the place of occurrence in which first of all Shankar was assaulted. Then there happens to be some contradiction while giving a detailed manner of occurrence. Further he had admitted his status as an accused in counter case launched by appellant Bhupendra.

22. PW-6 happens to be the I.O.. He had deposed that on 24.01.1983, he was posted at Madhepura P.S.. On the same day, he had registered a case on the basis of written report submitted by Panchu Yadav. He had inspected the place of occurrence which happened to be Darwaza of informant. He took statement of witnesses and after completing investigation had submitted charge-sheet. Then, there happens to be contradiction of the witnesses recorded under para-4, 5 and 6 of the cross-examination. In paragraph-7 he had submitted that he had mistakenly left to examine injured. In para-8, he had stated that he had not seized any material from the place of occurrence.

23. While considering the appeal filed on behalf of the State, in a decision in the case of ***Kathi Bharat Vajsur & Anr v. State of Gujarat*** reported in ***2012 (3) BLJ SC 41***, the same has been detailed after taking into account so many decisions and under para-12 it has been observed that in ***Dwarka Dass v. State of Haryana***, (2003) 1 SCC 204, the dicta of all these decisions has been crystallized thus:-

“ 2. While there cannot be any denial of the factum that the power and authority to apprise the evidence in an appeal, either against acquittal or conviction stands out to be very comprehensive and wide, but if two views are

reasonably possible, on the state of evidence: one supporting the acquittal and the other indicating conviction, then and in that event the High Court would not be justified in interfering with an order of acquittal, merely because it feels that it, sitting as a trial court, would have taken the other view. While re-appreciating the evidence, the rules of prudence requires that the High Court should give proper weight and consideration to the views of the trial judge...”

24. Now coming to the nature of the evidence and further admission on the part of prosecution witness including the informant regarding presence of counter case as well as having conviction recorded against the prosecution party, it looks pertinent to deal with the relevant documents which have been brought up on record at the instance of appellant-convict. From Ext-A, Injury report, it is evident that Bhupendra had sustained following injuries:-

1. Lacerated wound ½”x 1/4”x skin deep on the left cheek.
 2. Linear abrasion 2” just below right medial malleolus of the right foot.
 3. Linear abrasion 1” on the back of the middle of the right leg.
 4. 2 abrasion ¼”x1/4” and 1/3”x ¼” on the right second and third toe.
- The above injuries have been identified as simple in nature and caused by hard and blunt substance. The nature of injury suggest its appearance as superficial in nature.

25. Ext-B happens to be judgment dated 20th February 1989 and from perusal of the same, it is evident that prosecution party was found


guilty for an offence punishable under Sections 323, 348 of the IPC and on account thereof, Panchu, Videshi and Chandrakishore were directed to undergo SI one year each while Shanakar Pd. Yadav was released giving benefit of Probation of Offenders Act on account of his tender age.

26. Ext-B/1 happens to be another judgment. The other exhibits are also the different documents showing longstanding dispute amongst the parties.

27. Therefore, from the counter version also it is crystal clear that an occurrence took place and for that there happens to be version and counter version. In the aforesaid background one has to see whether the evidence on record has suggested and proved the manner of occurrence as well as genesis of occurrence. There is consistent version with regard to assault made by appellant, Bhupendra Yadav over the person of Shankar. Admittedly, Shankar was not examined during course of investigation but the defence on its own got it explained from the evidence of PW-6, the I.O who had categorically stated that mistakenly, he left to examine Shankar and in the aforesaid background evidence of PW-5, Shankar, an injured should not be discarded. Apart from this, for the negligence of investigating authority prosecution case cannot be brushed aside.

28. In a decision in the case of *Waman & Ors v. State of Maharashtra* reported in (2011) 7 SCC 295 at para 36 it has been held:-

“36. Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the



injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case.”

29. From the evidence on record it is also evident that the occurrence took place on the background of dispute over harvesting of Rahar crop and during course thereof single blow was given over the head of Shankar. The blow as per evidence happens to be an outcome of spur of moment. There was no repeated attempt at the hands of accused. The aforesaid event was also taken into account by the learned lower court while wiping out application of Section 307 of the IPC. The learned lower court had rightly concluded by observing that a case under Section 324, 323 of the IPC is made out. Therefore, the finding of the learned lower court is concurred.

30. With regard to sentence, we see that it is a fit case wherein there should be application of Section 3 of the Probation of Offenders Act in the background of the fact that both the parties are own *Pattidars* and are contesting in the background of land dispute. Furthermore, the appeal is of

the year 1990 and much water has flown since then. Accordingly, the appellant is directed to be released on due admonition which would be exercised by the learned lower court.

31. With the aforesaid modification in sentence, the appeal filed on behalf of appellant as well as the appeal filed on behalf of Government are dismissed.

(Mihir Kumar Jha, J)

(Aditya Kumar Trivedi, J)

Patna High Court
Dated the 27th day of
July, 2012.
Md.Perwez Alam/AFR